EMPLOYMENT LAW UPDATE

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I. Introduction

A. This outline addresses the handful of important Supreme Court employment law cases from the 2003 and 2002 Terms.

B. The large volume of Tenth Circuit employment litigation makes it impossible comprehensively to cover Tenth Circuit decisions; selected Tenth Circuit cases from 2003-2004 regarding important developments are covered.

II. Title VII and ADEA

A. The Protected Class in Age Discrimination Cases

1. *General Dynamics Land Systems v. Cline*, 124 S. Ct. 1236 (Feb. 24, 2004): Discrimination in favor of workers over 50 and at the expense of workers between 40 and 50 does not violate the ADEA's prohibition on discrimination "because of … age"; therefore, employer did not violate ADEA by eliminating health insurance benefits for workers under 50 but retaining program for workers over 50.

a) General Dynamics and the UAW entered into a collective bargaining agreement that eliminated the company's obligation to provide health benefits upon retirement to currently-working employees under 50 years old. The 6th Circuit held this violated the ADEA. The Supreme Court reversed.

b) It may be that the most important facts in the case were that it concerned a benefits program, rather than a decision to hire or fire, and that the program seemed to the majority to be a reasonable solution to a difficult problem of health care costs rather than callous bias against 40-somethings. In addition, the ERISA/Internal Revenue Code provisions relating to the structure of benefit plans allow employers to treat employees above a certain age differently than other

employees who are also over 40 (e.g., early distributions at age 59 ½, receipt of benefits upon retiring at 65, upward adjustment of pension benefits for employees who work past age 70 ½).

c) Query whether the same rationale would apply to an employer that refused to hire a 45-year-old, saying: "Look, I think everyone over 40 is incompetent, but the law makes me hire some old folks anyway. I'd rather hire a 65-year-old and be stuck with an incompetent for only a few years than hire you and be stuck with you for 20 years."

2. The case may be as important for what it reveals about the Court's approach to statutory interpretation as it is for stating the rule. The majority (per Souter) relied heavily on legislative history, statutory purpose, and common sense (or "social history") to conclude that the ADEA should be read only to prohibit discrimination against the relatively older in favor of the relatively younger. The two dissents (per Scalia and per Thomas) relied on plain language (the ADEA prohibits discrimination against anyone over 40 "because of … age") and on *Chevron* deference (the EEOC had interpreted the ADEA to prohibit discrimination against younger employees so long as they are within the protected class).

a) This may be a useful case to cite when legislative history and purpose conflict with statutory language, and also to cite to show that Chevron deference to an agency interpretation of a statute is not required, even when the statutory language seems to be clear, when the interpretation is unreasonable.

B. Substance: Adverse Employment Action

1. Title VII prohibits "discriminat[ion]" "with respect to … compensation, terms, conditions, or privileges of employment, because of … race, color, religion, sex, or national origin" and also prohibits an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin." Title VII also prohibits "discriminat[ion]" in retaliation for opposing practices that violate Title VII or for participating in proceedings to enforce Title VII.

a) Most circuits, including the Tenth, have held that only "adverse employment actions" satisfy the statutory requirement of "discrimination" or "limitation, segregation, or classification."

2. *Annett v. University of Kansas*, No. 03-3069, 2004 U.S. App. LEXIS 11708 (10th Cir. June 15, 2004). Failure of University administrator to request that plaintiff be listed as "Principal Investigator" (PI) on one grant application and failure to inform plaintiff of University regulations that would allow her to apply for PI status on other grants are not "adverse employment actions" within the meaning of Title VII, and therefore may not be the basis for a claim of retaliation.

   a) In the Tenth Circuit, adverse employment actions are not limited "to monetary losses in the form of wages or benefits," but include "acts that carry a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects." A "mere inconvenience or an alteration of job responsibilities" is not an adverse employment action. *Annett v. University of Kansas,* at *11 (internal quotations omitted) (citing *Sanchez v. Denver Public Schools*, 164 F.3d 527 (10th Cir. 1998); *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996); *Aquilino v. University of Kansas*, 268 F.3d 930 (10th Cir. 2001).

3. *Stinnett v. Safeway, Inc.*, 337 F.3d 1213 (10th Cir. 2003). Transfer from a position as an assistant to a technician to a position at equal pay and benefits as a meat-wrapper is an adverse employment action, because the reassignment resulted in a de facto reduction in responsibility and required a lesser degree of skill.

4. *Wells v. Colorado Dept of Trans.*, 325 F.3d 1205 (10th Cir. 2003). The following aspects of employer's treatment of plaintiff were not "adverse employment actions": (1) Removing her as a project engineer and assigning her as an assistant project engineer (because the jobs had the same responsibility; the less prestigious title in the second job was because the overall project was larger). (2) A supervisor's derogatory remarks, vow to have plaintiff removed from his supervision, and refusal on the few days during which plaintiff was at work in a long period when plaintiff was largely on medical leave (because they did not alter her working conditions). The following were "adverse employment actions": (1) Transferring plaintiff from a project engineer position which involved supervising contractors, keeping records of project development and cost, and coordinating with landowners, utilities,

and agencies, to a position where she counted cars at an intersection (because the responsibilities were significantly different). (2) Firing plaintiff.

5. Implications: Some dignitary injuries, even if accompanied by no economic job action, still violate Title VII. To take an extreme example, an employer that maintained race-segregated drinking fountains or bathrooms would violate Title VII. Adverse employment action may be an easier way than the eternally difficult issue of analyzing motive for courts to separate what they consider frivolous from meritorious employment litigation. The challenge is to limit the "adverse employment action" category in a way that does not ignore important but difficult to identify and quantify dignitary harms when the action in question may seem trivial but the bias motivating the action is clear.

C. Motivation

1. *Neal v. Roche*, 349 F.3d 1246 (10th Cir. 2003): When plaintiff *concedes* that employer's real motivation for an adverse employment action is a reason not prohibited by civil rights laws, district court may enter summary judgment for defendant.

D. Retaliation – Whether the plaintiff must have a *reasonable* good-faith belief that conduct which s/he was retaliated against for complaining about violated Title VII. *Crumpacker v. State of Kansas, Dept. of Human Resources*, 338 F.3d 1163 (10th Cir. 2003).

1. Court holds that Title VII permits plaintiffs to maintain retaliation claims based on a *reasonable* (but not an *unreasonable*), good faith belief.

2. The court reads *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001), implicitly to reject prior Tenth Circuit decisions (*Jeffries v. Kansas*, 147 F.3d 1220 (10th Cir. 1998); *Shinwari v. Raytheon Aircraft Co.*, 215 F.3d 1337, 2000 WL 731782 (10th Cir. 2000) (unpublished)) that may have allowed retaliation claims based on an *unreasonable* good faith belief.

E. Constructive Discharge and Affirmative Defense

1. *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (June 14, 2004). To establish constructive discharge, a plaintiff alleging sexual harassment must show that the working environment became so intolerable that her resignation qualified as a fitting response. The employer may assert the *Ellerth/Faragher*

affirmative defense in a constructive discharge case unless the plaintiff quit in reasonable response to an official action that adversely changed her employment status or situation, such as a demotion, extreme cut in pay, or transfer to an unbearable position.

a) After a prolonged period of offensive sexual behavior by three supervisors, the supervisors arrested plaintiff for theft based on her having removed her computer skills exams from a drawer in the women's locker room without permission. The supervisors refused to release plaintiff from custody and continued to interrogate her even after she resigned. Eventually she was released and never prosecuted.

b) Plaintiff reported to the PSP's Equal Employment Officer that she "might need some help" and, two months later, that she was being harassed and was afraid. The EEO told plaintiff to file a complaint but did not tell her how to do so.

c) The M.D. Penn. granted summary judgment to employer because plaintiff unreasonably failed to use employer's internal antiharassment procedure. 3d Circuit reversed, holding that the *Ellerth/Faragher* affirmative defense is not available in hostile environment cases alleging constructive discharge.

d) Supreme Court vacates 3d Circuit's ruling that the *Ellerth-Faragher* affirmative defense is not available in all hostile environment constructive discharge cases, and remands because the case presents genuine issues of material fact concerning both the hostile environment and constructive discharge claims.

e) Implications: The Court makes clear that hostile environment cases are not a category distinct from quid pro quo cases; rather, they are simply different ways of showing discrimination in employment "because of" a protected trait.

F. Burden of Proof Under Mixed Motive and Pretext

1. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003): Plaintiff need not present direct evidence of discrimination in order to obtain a mixed-motive instruction under Title VII. Rather, all evidence (direct and circumstantial) may be considered in determining

whether the jury should be instructed on the mixed-motive analysis as well as the pretext analysis. (Abrogating contrary dicta in *Shorter v. IGC Holdings*, 188 F.3d 1204, 1208 n.4 (10th Cir. 1999).) To obtain a mixed motive instruction, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice."

a) *Costa* determined that Justice O'Connor's opinion in *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), requiring "direct evidence" of discriminatory intent as a precondition to mixed motive analysis, was legislatively overruled by section 703(m) of the Civil Rights Act of 1991.

b) Implication: Evidence sufficient to support a pretext verdict ought to be sufficient to support a mixed motive instruction.

c) Open questions: How much evidence is sufficient to obtain a mixed motive instruction? How much evidence is sufficient to support a verdict for plaintiff?

2. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), eliminated the so-called "pretext plus" heightened evidentiary requirement for cases litigated under the *McDonnell Douglas – Burdine* framework. A court assessing the plaintiff's evidentiary showing at summary judgment (and, presumably, at bench trial or on a motion for judgment as a matter of law), should determine whether, considering all the evidence (including evidence adduced by plaintiff to support the prima facie case and evidence adduced by plaintiff to prove pretext), plaintiff has proved discrimination by a preponderance of the evidence. Plaintiff may rely, in proving pretext, on evidence adduced in support of prima facie case.

a) Open question: How much evidence is sufficient to support a verdict for plaintiff? In other words, when do the quantity and quality of circumstantial evidence of discrimination cross the line from insufficient (where the evidence of discrimination is likely to be labeled "stray remarks") to sufficient?

3. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Proof that defendant's articulated reason is pretext does not compel a judgment as a matter of law for plaintiff; rather, the plaintiff must

still prove by a preponderance of the evidence that discrimination was the reason.

4. In light of *Costa*, *Reeves*, and *St. Mary's*, what role for the tripartite *McDonnell Douglas-Burdine* Framework?

   a) In *Wells v. Colorado Dept. of Trans.*, 325 F.3d 1205 (10th Cir. 2003) (per Hartz, joined by Kelly and McKay), Judge Hartz authored a separate opinion in addition to the court's opinion. In the separate opinion, he asserted that the tri-partite *McDonnell Douglas-Burdine* framework has outlived its usefulness and should be abandoned as the lens through which courts of appeals review summary judgment rulings as well as trial judgments.

   b) The Supreme Court's rejection of a heightened proof standard in both pretext and mixed motive cases, and rejection of a mandatory judgment for plaintiff upon proof of pretext, means that there is almost no distinction between pretext and mixed motive cases, and no difference between the usual preponderance of the evidence standard in civil cases and the proof standard in employment discrimination cases.

   c) Rather, there is just one difference between a Title VII case and an ordinary civil case: there is an affirmative defense for employers to avoid liability for individual make-whole relief or damages (but not other equitable relief and attorneys' fees). If there is evidence (direct or circumstantial) that defendant considered an illegitimate factor, and there is evidence that legitimate factors were also considered, the court can, if either party requests, shift the burden to the defendant to prove the same decision defense.

      (1) The mixed motive analysis, and the remedial affirmative defense of section 703(m), may be important not only in single decisionmaker-mixed motive cases like *Costa* but also in multiple decision maker cases, like *Price Waterhouse.*

   d) *Abuan v. Level 3 Communications, Inc.*, 353 F.3d 1158 (10th Cir. 2003) (Per Seymour, joined by Holloway and Ebel). On appeal from a plaintiff's verdict in a Title VII and ADEA suit, 10th Circuit held:

(1) District court properly denied motion for judgment as a matter of law, even if plaintiff did not prove a prima facie case, because plaintiff produced sufficient evidence of age discrimination in his demotion and the division of his former responsibilities among three younger employees.

(2) Plaintiff was entitled to the statutory maximum compensatory damages under Title VII (capped at $300,000), plus backpay and liquidated damages under the ADEA.

(3) Objections to court's failure to give two jury instructions is waived by failing to object to instructions or to proffer instructions at jury instructions conference; raising the same issue about the law at summary judgment does not preserve the objection.

(4) District court did not abuse its discretion in not reinstating the plaintiff given the hostility between the parties and in awarding front pay instead. But the court abused its discretion in using plaintiff's most recent salary as the basis to calculate front pay because the salary was lower than it would have been had there been no discrimination. Remands for calculation of front pay and attorney's fees.

e) *Mattioda v. White*, 323 F.3d 1288 (10th Cir. 2003): The prima facie burden for a white plaintiff bringing a reverse discrimination suit is higher than for a minority plaintiff; the plaintiff must "establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." Once a plaintiff makes such a showing, s/he is entitled to the same inference of discrimination as a minority group member who establishes a prima facie case.

5. The *Costa* rejection of the direct evidence requirement probably applies to the ADEA and ADA as well because they are modeled on Title VII and, like Title VII, do not contain language requiring heightened proof. However, unlike under section 703(m) of Title VII, if an ADEA defendant succeeds in establishing the same decision affirmative defense, pursuant to *Price Waterhouse v. Hopkins*, the defendant would avoid liability altogether.

G. Eleventh Amendment Immunity. *Crumpacker v. State of Kansas*, 338 F.3d 1163 (10th Cir. 2003).

1. Former employee alleged gender discrimination and retaliation prohibited by Title VII. Interlocutory appeal of denial of state's motion for summary judgment.

2. Denial of claims of 11th Amendment immunity are immediately appealable under the collateral order doctrine. *Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy*, 506 U.S. 139 (1993). Court holds that Congress had power under section 5 of the 14th Amendment to abrogate states' immunity from Title VII retaliation claims even though Congress made no findings on the prevalence of retaliation, as opposed to findings on the prevalence of gender discrimination and a statement that state employees lacked "an effective forum to assure equal employment."

3. Court also may consider on interlocutory appeal claims that are "inextricably intertwined" with the appealable claim, and therefore considers whether a Title VII retaliation claim may be maintained on a subjective good-faith belief that the underlying conduct, which plaintiff was retaliated against for opposing, violated Title VII. Court holds that Title VII does require that the plaintiff has a reasonable good faith belief that the underlying conduct violates Title VII, and that Congress validly abrogated states' 11th Amendment immunity to such claims. Congress' authority under section 5 extends to prohibiting retaliation against employees who oppose practices that they reasonably and in good faith believe violates Title VII, even if that underlying conduct is not *actually* unconstitutional gender discrimination.

H. Right to Sue Letter. *Hiller v. State of Oklahoma*, 327 F.3d 1247 (10th Cir. 2003).

1. Because Title VII states that the EEOC "or the Attorney General in a case involving a government, governmental agency, or political subdivision" shall issue a Right-to-Sue letter in a case in which the Attorney General has not filed a suit on a discrimination charge, the plaintiff may not bring suit against a governmental defendant based on a right to sue letter issued by the EEOC. This is true even where the Attorney General fails or refuses to issue a right-to-sue letter because, under a 1980 regulation establishing work-sharing between the EEOC and the Department of Justice, 29 C.F.R. §1601.28(d), the EEOC is empowered to issue a right-to-sue letter in cases involving government defendants. However, the court of appeals holds that a district court abuses its discretion in declining

to grant equitable relief permitting the plaintiff to sue because otherwise it would be impossible for plaintiffs to bring claims at all.

2. The Eleventh Circuit seems to be the only other circuit that requires right-to-sue letters to be issued by the Attorney General rather than the EEOC, and it, too, considers it an abuse of discretion for a district court to dismiss a suit when the EEOC issues a right-to-sue letter and the Attorney General fails or refuses to do so as well. *Fouche v. Jekyll Isl.*, 713 F.2d 1518 (11th Cir. 1983).

I. Jury Instructions. *Hertz v. Luzenac America, Inc.*, 370 F.3d 1014 (10th Cir. 2004)

1. District court did not err in refusing to give a jury instruction that "unreasonable conduct does not constitute protected activity" in a retaliation case when the allegedly unreasonable activity was yelling at a supervisor who had just made an anti-semitic remark to the plaintiff, a Jewish employee. The plaintiff was fired not long after the conversation which ended in the supervisor making the allegedly discriminatory remark and running out of the plaintiff's office while the plaintiff yelled after him.

2. In a retaliation case in which the jury was instructed that the "plaintiff must prove that there exists a causal connection between plaintiff's actions opposing discrimination and the employer's adverse action" (internal punctuation omitted), district court did not abuse its discretion in declining to instruct jury that a causal connection does not exist, and the jury must find for defendant, if the defendant did not know the plaintiff had complained of discrimination or engaged in protected activity.

J. Exhaustion of administrative remedies

1. *Monreal v. Potter*, 367 F.3d 1224 (10th Cir. 2004). In a suit by postal employees against Postal Service, individual allegations of discrimination can be exhausted through a class administrative complaint.

2. *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191 (10th Cir. 2004). 26 employees laid off when their employer was purchased by defendant adequately exhausted administrative remedies on a failure to hire claim.

a) One group adequately exhausted by filing an EEOC charge that they were "terminated" rather than "not hired." Charges should be "liberally construe[d]" and this charge was adequate because it identified the parties and described generally the action or practices complained of.

b) A second group of plaintiffs who did not file charges could "piggyback" their suit on the charges filed by the first group of plaintiffs because their claims arose out of the same circumstances and occurred with the same general time frame, and the charge that was filed stated that it was "made on behalf of all others similarly situated."

K. Class Certification. *Dukes v. Wal-Mart Stores,* No. C 01-02252 MJJ, 2004 U.S. Dist LEXIS 11297 (N.D. Cal. June 21, 2004).

1. Certifies a class of women employed at all Wal-Mart stores challenging sex discrimination in pay and promotion.

2. Rejects Wal-Mart's contention that localized and highly subjective decisions regarding pay and promotion defeated commonality.

3. Plaintiffs presented factual and expert opinion evidence that Wal-Mart has company-wide policies; expert statistical evidence of class-wide gender disparities in pay and promotion due to discrimination; anecdotal evidence from class members of discriminatory attitudes held or tolerated by management.

III. Americans with Disabilities Act

A. *Raytheon Co. v. Hernandez*, 124 S. Ct. 513 (2003). Employer's policy against rehiring former employees fired for misconduct is a legitimate, nondiscriminatory reason, under a disparate treatment theory of the ADA, for refusing to hire employee who is a recovering cocaine/alcohol addict. Court does not consider whether application of this rule violates the ADA on a disparate impact theory because plaintiff waived such a theory in lower courts. Vacates 9th Circuit ruling that application of rule violates the ADA in a disparate treatment case.

IV. Definition of "Employee" For Purposes of Coverage of Title VII, ADEA, ADA

A. Many federal employment statutes exempt "small" employers, usually those employing fewer than 15 (or 50) employees employed during a given number of weeks within a calendar year.

B. In addition to determining employer coverage threshold, the statutory definition of employee determines who is entitled to the protection of the statute, assuming the employer is covered.

C. In *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 123 S.Ct. 1673 (2003), the Court addressed the question whether physician-shareholders are "employees" for purposes of determining the 15-employee threshold for employer coverage under the ADA. The Court asserted that the multifactor common law test for distinguishing master from servant should be used and adopted a six-factor test used by the EEOC. No one factor is determinative or weighs more than another and the list of factors is not necessarily exhaustive.

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

2. Whether and if so, to what extent the organization supervises the individual's work;

3. Whether the individual reports to someone higher in the organization;

4. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;

5. Whether the individual shares in the profits, losses, and liabilities of the organization.

D. The Court remanded for consideration of the factors, noting that the evidence cut both ways: The four physician-shareholders control the operation of the clinic, share in its profits and are personally liable for malpractice; on the other hand, they receive salaries, must comply with standards set by the clinic, and report to the personnel manager.

V. Fair Labor Standards Act

A. Independent Contractor. *Johnson v. The Unified Govt of Wyandotte County/Kansas City*, No. 01-3398, 2004 U.S. App. LEXIS 11115 (10th Cir. June 7, 2004).

1. Off-duty Kansas City police officers working for the Housing Authority of Kansas City (HA) pursuant to an agreement between the City and the HA were held to be independent contractors, not employees, and therefore not entitled to overtime compensation under the FLSA. The HA exercised little supervision, start times and end times, and required no further training from the HA (beyond the training they received from the City as police officers).

Although the officers had no opportunity for profit or loss from their work, the flexibility they had regarding their work hours made their circumstances different from most employees and therefore did not compel their being regarded as employees as opposed to independent contractors. In addition, the work of the security guards was not integral to the HA's business because the HA functioned for years before and after the program without security patrols.

B. Agriculture Exemption.

1. *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199 (10th Cir. 2004).

2. *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180 (10th Cir. 2004).

C. Domestic Service Exemption. *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004).

1. Under 29 U.S.C. § 213(a)(15) employees "employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" are not protected by the minimum wage and overtime requirements. The regulation interpreting section 213(a)(15) defines "domestic service" to include "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis." 29 C.F.R. § 552.3.

2. The question is whether this "companionship exemption" applies to the employees of Bios Corp., which has a contract with the State of Oklahoma to provide services to developmentally disabled persons. The district determined that, due to the differences in living circumstances of the many Bios clients, made individualized assessment of whether the care was being given in "private homes," as required by the exemption, difficult. The Court of Appeals held that an individualized assessment was necessary, and remanded for the determination. In order for Bios to prevail on summary judgment, it must prove, "clearly and unmistakably, that the living unit is a private home *and* that there are no facts in the

record creating a material dispute on this issue." In making that individualized show, the court of appeals directed the lower court to consider six factors:

a) Whether the client lived in the living unit as his or her private home before beginning to receive services from Bios.

b) Who owns the living unit; if it is owned by the client or the client's family, that is "a significant indicator" that it is a private home. If it is owned by a third party, and the client or client's family leases it from the third party, that is "some indication" that it is a private home. If the service provider (Bios) leases the unit, "that is some indication that it is not a private home."

c) Who manages and maintains the residence, by paying the mortgage/rent and utilities, and providing food and linens. If the client/family does, that "weighs strongly in favor" of it being a private home.

d) Whether the client would be allowed to live in the unit if the client were not contracting with the provider of services.

e) Whether the cost/value of the services provided are a substantial portion of the total cost of maintaining the living unit (not a private home).

f) Whether the service provider uses any part of the residence for the provider's own business purposes.

VI. Family and Medical Leave

A. Eleventh Amendment Immunity.

1. *Nevada Dept of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Congress validly abrogated the sovereign immunity of states to suits under the FMLA.

2. *Brockman v. Wyoming Dept of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003). Congress did not abrogate the sovereign immunity of states to suits under the FMLA when the alleged FMLA violation related to employees' need of leave to care for themselves, as opposed to care for family members. *Hibbs* emphasized the legislative history of the FMLA showing the gender discrimination in denial of family leave; there is no legislative history showing

gender discrimination by states in denial of leave to care for oneself.

a) This decision anticipates *Tennessee v. Lane*, 124 S. Ct. 1978 (May 17, 2004), which held that Title II of the ADA, as applied to cases implicating fundamental rights (such as access to courts), abrogates state sovereign immunity, but suggests that Title II does not abrogate immunity when applied to other rights. *Tennessee v. Lane* thus seems to suggest that courts cannot always conclude that a statute as a whole abrogates state immunity, and must instead examine particular applications of the statute.

b) The difference between *Tennessee v. Lane* and *Brockman v. Wyoming DFS*, however, is that the case-by-case inquiry invited by *Tennessee v. Lane* focuses on a legal question: is the state disability discrimination that is being challenged under Title II one that affects fundamental rights. Under the *Brockman* analysis, the question might be whether the denial of self-care leave would be gender discriminatory. For example, if self-care leave is denied for conditions affecting women, the application of the FMLA might satisfy the sovereign immunity waiver requirements of *Hibbs* and *Lane*.

VII. ERISA

A. ERISA Remedies. *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004). Majority (Baldock & Tymkovich) held, in a large class action challenging closure of a plant as a violation of section 510 of ERISA, that backpay was legal, not equitable, relief and therefore unavailable under ERISA.

a) The plaintiff class of 1000 former employees proved at trial that defendant McDonnell Douglas closed a Tulsa facility for the purpose of preventing them from receiving benefits under ERISA plans. The case proceeded to a liability determination; the district court determined that front pay and reinstatement were unavailable, payment of benefits was resolved by a settlement agreement, and the only remaining claim was for backpay incurred from the date of the plant closure until trial.

b) The majority (per Judge Baldock) interpreted the two leading Supreme Court cases limiting remedies available under ERISA to equitable remedies, *Mertens v. Hewitt*

Assocs., 508 U.S. 248 (1993), and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). The majority reasoned that backpay was legal, rather than equitable, relief (a) because it was based on each individual class member's loss rather than defendant's gain; (b) it was not intertwined with a claim for equitable relief since plaintiffs could no longer seek equitable relief of reinstatement; (c) the court rejected the analogy to backpay which is treated as equitable under Title VII and the NLRA; (d) the purpose of ERISA is not to make aggrieved employee's whole.

c) Judge Lucero dissented on the ground that backpay can be an equitable remedy when integrated with reinstatement, and should be treated as equitable in this case because the only reasons reinstatement and front pay were not available was because the length of time spent in litigation and the closure of the plant rendered reinstatement and front pay impracticable.

VIII. Conclusion